

REPUBLIC OF KENYA



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IN THE SPORTS DISPUTES TRIBUNAL AT NAIROBI

NSSF BUILDING BLOCK (A) 24TH FLOOR

SDTADK NO. EOO6 OF 2024

ANTI-DOPING AGENCY OF KENYA (ADAK).....APPLICANT

-VERSUS-

BRENDA JEROTICH KIPRONO.....RESPONDENT

DECISION

PANEL:

- | | |
|-------------------------------|---------------|
| 1. MRS. NJERI ONYANGO FCI Arb | - PANEL CHAIR |
| 2. MR. GABRIEL OUKO | -MEMBER |
| 3. MR. E GICHURU KIPLAGAT | -MEMBER |

COUNSEL APPEARING;

MR. BILDAD ROGONCHO- COUNSEL FOR ADAK/ APPLICANT

NO APPEARANCE FOR THE RESPONDENT

1. ABBREVIATIONS AND DEFINATIONS

The following abbreviations used herein have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR- Anti- Doping Rule

ADRV-Anti- Doping Rule Violation

WA- World Athletics

AK-Athletics Kenya

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

All the definitions and interpretation shall be construed as defined and interpreted in the constitutive document both local and international.

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2. PARTIES

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter ADAK) a State Corporation established under section 5 of the Anti-Doping Act No 5 of 2016, represented in these proceedings by Mr. Rogoncho Advocate

2. The Respondent is a female adult of presumed sound mind, a national and athlete, not represented in this proceeding

3. THE CHARGE

3.1 The Anti-Doping Agency has charged the respondent as an athlete with the charge of;-

“Presence of prohibited substance S1.1 Anabolic Androgenic steroids(AAS)/19-norandrosterone.

3.2. S1.1 Anabolic Androgenic steroids(AAS)/19-norandrosterone is listed under S1.1 of WADA’s 2023 prohibited list.

4. BACKGROUND FACTS

4.1. On 16th August 2023, an ADAK Doping Control Officer (“DCO”) collected a urine sample from the Respondent. The sample was split into two separate bottles, which were given reference numbers `A 7199563` (the A Sample) and B 7199563 (the B Sample) respectively.

4.2. Both samples were transported to the WADA accredited laboratory in Qatar where “A” sample was analyzed as prescribed and returned an adverse analytical finding (AAF) for presence of a prohibited substance: *S1.1 Anabolic Androgenic steroids(AAS)/19-norandrosterone.*

4.3. The findings were communicated to the Respondent athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 6th December 2023. The Respondent was, in the said communication, offered an opportunity to provide an explanation for the same by 26th December 2023. She was also informed of the process and possible consequences dependent on her actions in response to the Notice.

4.4. The Respondent failed to respond to the charges within the specified timeline and was yet to respond as of the time of filing this Charge document.

4.5 On 8th January 2024 a Notice to Charge was presented to the Tribunal by Mr. Bildad Rogoncho, on behalf of the Applicant. The following were the Tribunal’s directions dated the same day:

- i. The applicant shall serve the notice to charge, the notice of ADRV, the Doping Control Form, this direction No.1, and all relevant documents on the Respondent, by 31st January, 2024;
- ii. The Applicant shall engage with the Respondent for the purpose of establishing whether the Respondent would require Pro bono counsel and, in the case, where the Respondent expresses her desires to be represented, the Applicant will notify the Tribunal’s registry and

- cooperate with the Tribunal in the allocation of pro bono Counsel for the Respondent;
- iii. The panel constituted to hear this matter shall be as follows;
 - a. J Njeri Onyango, panel chairperson,
 - b. Gabriel Ouko, member,
 - c. E Gichuru Kiplagat, member
 - iv. The matter to be mentioned 1st February 2024 to confirm compliance and for further directions.

4.6. When the matter came up for mention Mr. Rogoncho informed the Tribunal that they had been unable to locate the Athlete. Further, he had requested the help of the Athletics Kenya federation to try and locate her. Mr. Rogoncho requested for twenty-one (21) days to try and locate her. The Tribunal granted the request and set the next mention as 29th February 2024.

4.7. At the mention on 21st March 2024, Mr. Rogoncho informed the panel that the matter was coming up to confirm filing of submissions. The panel confirmed that the Applicant had complied. The Tribunal directed for the matter to be listed for decision on 2nd May, 2024

5. SUBMISSIONS BY ADAK

5.1. ADAK`s submissions were filed on 20/3/2024. The Respondent is stated to be a national level athlete, and thus the WA Anti-Doping Regulations, the WADC and ADAK ADR apply to her.

5.2. ADAK submitted that they had met the requirements of Article 3.2 and had to the required standards and methods established the fact of an ADRV by the Respondent. That there was analytical proof of the presence of a prohibited substance in the Respondent`s sample.

5.3. ADAK further submitted that the respondent under Article 22.2 had to take responsibility in context of Anti-Doping, for what he ingested and used.

5.4. It was ADAK`s position that where use and presence of a prohibited substance has been demonstrated, it is not necessary that intent, fault, negligence or knowing use on the athlete`s part be demonstrated in order to establish an ADRV.

5.5. ADAK further submitted that Article 10.2.1 shifts onus to the athlete to demonstrate no fault, negligence or intention, in order to be a beneficiary of reduction of the 4 years' ineligibility sanction set out in Article 2.1.

5.6. On origin, the respondent didn't participate in these proceedings thus no explanation was provided on how the prohibited substance *S1.1 Anabolic Androgenic steroids(AAS)/19-norandrosterone* entered her system and therefore the origin has not been established.

5.7. On intention, ADAK submitted that for an ADRV to be committed non-intentionally, the Respondent must prove on a balance of probability that the ADRV was not intentional. ADAK relied on CAS 2019/A/6213 at paragraph 2 'The burden of proof with respect to intent lies with the athlete, who has the duty to establish, on a balance of probability, that the anti-doping rule violation was not intentional; that is the athlete has the burden of convincing the CAS Panel that the occurrence of the circumstances on which he/she relies is more probable than their non-occurrence'.

5.8. ADAK further submitted that since proof of source is a critical first step in exculpation of intent, the Respondent's inability to establish how the prohibited substance entered her body, raises questions regarding her intention when she was in contact with the prohibited substance.

5.9. ADAK submitted that the Respondent was duly notified of the procedural steps and her rights in accordance with ADAK rules and WADA code. However, the Respondent's non-participation in these proceedings means that she failed to provide an alternative plausible explanation disproving her intent when she ingested the prohibited substance.

5.10. ADAK submitted that the Respondent didn't discharge her burden by a balance of probabilities, moreover an athlete with clean hands who faces an imminent four-year ban would leave no stone unturned in her quest to prove her innocence and non-intention to dope. The respondent in this case, however, chose not to participate, and many questions regarding her intention remain unanswered.

5.11. ADAK further submitted that the Agency's burden of proof is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids.

5.12. It was ADAK's submissions that an offence has therefore been committed as it was established that a prohibited substance was present in the athlete's tissues or fluids. There is thus a legal presumption that the respondent is responsible for the mere presence of the prohibited substance, regardless of the intention of the athlete to commit such an offence

5.13. On the question of fault/negligence ADAK places reliance on ADAK ADR 2.1.1 & 2.1.3. The Respondent has responsibility to be knowledgeable and comply with the ADAK ADR and take responsibility in the context of Anti-Doping for what they ingest and use but was negligent in discharging such responsibility. That thus the Respondent was negligent due to her failure to exercise caution to the greatest possible extent.

5.14. ADAK urged this panel to apply the principle of strict liability in this instance placing reliance on CAS 2014/A/3820 that the Respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.

5.15. ADAK considers that the following relevant issues have arisen and should be considered in setting the sanction.

- a) The ADRV has been established as against the athlete
- b) The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint herself with anti-doping policies.
- c) The Respondent herein has failed to give any explanation for her failure to exercise due care in observing the products ingested and used and as such the ADVR was a result of her negligent acts.

5.16. ADAK therefore submits that the panel should consider the sanction provided in Article 10.3.3 of the ADAK Rules and sanction the athlete to four (4) years ineligibility.

6. JURISDICTION

The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following Laws

- a) Sports Act, No. 25 of 2013 under Section 58
- b) Anti-Doping Act, No 5 of 2016, under section 31(a) and (b),(as amended from time to time).

- c) ADAK Anti-Doping Rules , under Article 8.

In the circumstances, the Tribunal assumes jurisdiction from the above-mentioned provisions of Law.

7. APPLICABLE RULES

Section 31(2) of the Anti-Doping Act, Provides that, the Tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations 2021, the Sports Act, the WADA CODE 2021 and International Standards established under it, the UNESCO Convention against Doping in sports, amongst other legal resources when making its determination.

8. MERIT

8.1. In the absence of participation by the Athlete, the following issues are uncontested.

- a) That the urine sample was collected from the Athlete on the 21th of July 2023.
- b) That there is no indication of previous ADRV by the Athlete.
- c) That a notice to charge dated the 8th of January 2024 was issued by the Applicant's Chief Executive Officer, and in the charge document it was noted that in the said communication the Athlete was offered an opportunity to provide an explanation for the ADRV by the 26th of December 2023, but no response was received from the Athlete. And that efforts to locate the Athlete's whereabouts were futile since no cell phone number and no additional details had been provided by the Athletics Kenya Federation.

8.2. The issue then to be determined is whether the Athlete committed the anti-doping rule violation as per the charge sheet. The Applicant's prosecution is based on the provisions of the Code which is as follows; as outlined at paragraph D10 of the charge documents, Dated 13th December 2023. **presence of a prohibited substance: S1.1 Anabolic Androgenic steroids(AAS)/19-norandrosterone.**

8.3. In the charge document, the applicant has indicated that there was no known Therapeutic Use Exemption (TUE) recorded at the IAAF for the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards for Laboratories which may have caused adverse analytical findings. The Applicant also submitted that they failed to respond to charges within the specified time as set out in the notification of charge and also, upon the Respondent being served with the charge document in the current proceedings.

8.4. This panel has reviewed the Affidavit of Service filed by the Applicant at the request of the Tribunal to confirm effective service of the charge document. Having done so, the panel is satisfied that much effort was put in by the Applicant to contact the Respondent via all known means, including service through the Athletics Kenya Federation. The Affidavit in question is deposed by Mr. Stanley Mwakio and is deposed on the 26th day of February 2024 and filed at the tribunal on the 26th of February 2024.

8.5. The Applicant had also submitted that despite being notified of the adverse analytical finding by the Applicant, the Respondent did not request for the analysis of Sample B and therefore waved his right of analysis of the same under WA rule 37.5.

8.6. Further, WADC and ADAK ADAR articles 2.1.2 states that sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following; Presence of a prohibited substance or its metabolites or markers in the Athlete's sample, A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or where the Athlete's B sample is analyzed and the analysis of the Athlete's B sample confirms the presence of the prohibited substance or its metabolites or markers in the Athlete's sample. Without a contrary analysis of the Athlete's A sample, then the presence of the prohibited substance in the Athlete's sample has been demonstrated by the Applicant as argued by the Applicant. Where use and presence of a prohibited substance has been demonstrated, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an ADRV.

8.7. The Panel is satisfied that proper service was effected on the Respondent who failed to respond. And in the circumstances, therefore, the Panel is

comfortably satisfied that the Applicant has established that the Athlete in this matter has committed an ADRV.

8.8. On whether the violation committed by the Athlete is intentional especially where an unspecified substance is involved. The code places the burden of proof upon the Athlete to rebut a presumption or establish specific facts or circumstances, and the standard of proof shall be by balance of probability. In the present circumstances, in the absence of the Athlete's participation or any document to the contrary, the presumption would be that the specified facts and circumstances have not been rebutted.

8.9. In the absence of any response from the Respondent, it would not be necessary to go into the issues of whether the ingestion of the substance was intentional or otherwise or whether to assess the degree of fault. It is the position of the Panel, therefore, that the existence of The ADRV has been sufficiently demonstrated to the required degree by the Applicant.

9. SANCTIONS

9.1. It was the submission by the Applicant that for an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance and the agency can establish that the ADRV was committed intentionally. If Article 10.2.1 does not apply, the period of ineligibility shall be two years. It was further submitted that Article 10.4 creates 2 conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an Athlete who is in breach of Article 2.1. These are; that the Athlete must establish how the specified substance entered his or her body, or that the Athlete did not intend to take the specified substance to enhance his or her performance. It is only if those two conditions are met that the Athlete can benefit from a reduction in the period of ineligibility.

9.2. The Applicant's position in the submissions is that the Athlete in the current case has not discharged the burden by any degree to warrant reduction of the sanction specified. And as a consequence of the Respondent's lack of participation in these proceedings, no explanation has been provided for how the prohibited substance got into her system and therefore, the first venue to warrant reduction of a sentence is excluded. The

Applicant further submitted that on the second limb, the Respondent would also not in the absence of intentionally setting out intentions, have any ground to establish the level of degree of fault and that the same assessment is not applicable in the present circumstances. Therefore, at the end, the Applicant submitted that there are no grounds in the current proceedings to warrant any reduction of the sentence.

9.3. The Panel's position is that the breach of the relevant code requirements has been established. There being no response by the Respondent to dispel that position, the Panel also considers that there is a duty upon the Respondent to acquaint themselves with the requirements of Anti-Doping Rule violations and to be responsible for what is ingested. It is the Panel's finding that in the absence of a response, there are no circumstances to grant the Respondent any reduction in the specified period of ineligibility. The Panel also makes the following findings:

1. WADC's Article 10.13.2 provides that credit may be awarded for the Provisional period of suspension served by an Athlete as against the period of ineligibility that they are sanctioned for.
2. The panel has not been informed that there has been any Breach of the period of suspension by the Respondent.

10. DECISION

Consequent to the discussions on merits above, the Panel orders are as follows.

- a) The period of ineligibility shall be four (4) years.
- b) The period of Ineligibility shall be from the date of the Provisional Suspension for a period of four (4)years, and therefore the period commences on the 26th of December 2023 to the 25th of December 2027.
- c) Any and or all competitive results by the respondent effective the 21st of July 2023 are hereby disqualified.

d) Each party shall bear its own costs.

e) The right of appeal is provided for under Article 13 of the ADAK, ADR and the WADA Code.

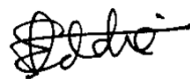
Dated at NAIROBI this 2nd day of May 2024



MRS. NJERI ONYANGO (FCI Arb)-----Panel chair



MR. GABRIEL OUKO -----Member



MR. E GICHURU KIPLAGAT -----Member